BRIEF FOR THE RESPONDENT IN OPPOSITION.

IN THE

Supreme Court of the United States

No. 539.

October Term, 1948.

SARAH ALLISON PAINTER, ADMINISTRATRIX OF THE ESTATE OF EDWIN D. PAINTER, DECEASED, LOREN E. TIMBS, ADMINISTRATOR OF THE ESTATE OF JOHN LAMBERT TIMBS, DECEASED, AND LESLIE F. HAYNIE, ADMINISTRATOR OF THE ESTATE OF WILLIARD TOLSON HAYNIE, DECEASED, PETITIONERS,

versus

SOUTHERN TRANSPORTATION COMPANY,
RESPONDENT.

LEON T. SEAWELL,
Attorney for Respondent.

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OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Virginia, is reported in 1948 A. M. C., page 1207, and is also found at pages 19-26, inclusive of the Record in this case.

The opinion of the United States Court of Appeals for the Fourth Circuit was entered November 8, 1948, has not been reported as yet, but is found at pages 52-58, inclusive of the Record.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 8, 1948. R., p. 58. The petition for *certiorari* was served upon attorneys for the respondent on January 31, 1949.

QUESTION PRESENTED.

The question involved was succinctly stated by Judge Soper, Circuit Judge, as follows:

> "The District Judge held that the rulings of the Maritime War Emergency Board were binding only on signatories to a document entitled 'Statement of Principles', pursuant to which the Board was created, and that consequently the defendant, which was not a signatory, was not bound by the Board's decision. The sole question before us is the correctness of that holding."

STATEMENT.

The Tug MENOMINEE was owned and operated by the Southern Transportation Company, and on March 31, 1942, was proceeding from Norfolk, Virginia, to a northern port with three loaded barges in tow. The three deceased seamen were members of the crew of that tug. On this voyage the tug was attacked by an enemy submarine and destroyed.

Plaintiff's actions were based upon a contention that by reason of a ruling of the Maritime War Emergency Board the defendant here was obligated to provide certain insurance for members of its crews. It ap-

pears from the record that on account of the highly emergent situation incident to the war activities, it was found necessary to attempt to secure a conference between seamen and operators so that danger of strikes and lockouts might be avoided during the period of the emergency. Therefore, a conference was called in Washington of the representatives of both these factions, at which time they drafted a request that some agency be appointed for the purpose of passing upon the various questions which would arise between labor and operators, and to provide machinery for the settlement of disputes without interruption of service or stoppage of work. This was known as "Statement of Principles", and is found at page 27 of the Record, and to it was attached "Exhibit A", which begins at page 27 of the Record and contains the signatures of all parties who were either present or represented at this conference. Acting upon this request, the President designated three men to serve as such a Board. This was on December 19, 1941, and is found at page 26 of the Record. It distinctly states that "The Board shall be known as the Maritime War Emergency Board and its powers and purposes shall be those set forth in accordance with Exhibit A of the Agreement referred to above".

The Southern Transportation Company was not invited to this conference, nor was it present, nor did it authorize anyone else to act for it. It was not until sometime later through another medium that they heard of the conference and of the designation of the members to act as a Board. Promptly upon receiving this information they communicated with the Board to ask if they were included, and received a reply from the Chairman of the Board that they were not covered by it unless they came in as one of the signatories. This determination by the Board appeared several times, and the Southern Transportation Company at the time of the sinking of the MENOMINEE had not become a signatory to the Agreement.

ARGUMENT.

The District Court after hearing the evidence by the witnesses in person and listening to the arguments of counsel, and having the benefit of the notes of authority of counsel, decided that there was no obligation upon the Southern Transportation Company under this Agreement and filed a very full findings of fact and conclusions of law which took the place of an opinion, and we refer this Honorable Court to this memorandum by the District Judge as being well expressed and quite dispositive of the issue here. What plaintiffs are attempting to do is to impose a liability upon the employer for a failure to comply with an Agreement or request joined in by a number of operators and labor unions. We contend earnestly that no person can be obligated to conform to such result without being a party to the original Agreement. In fact, as in this instance, the defendant was one of those not even invited to the conference.

From the very beginning the War Emergency Board itself recognized the restriction upon their authority, and that they had no jurisdiction whatever upon those who were not signatories. On January 9, 1942, after the Southern Transportation Company had gained information of such a conference held in Washington in December, they wrote to Mr. Macauley, the Chairman, as follows:

> "We have been informed that your Board made a decision requiring owners of merchant vessels documented under the laws of the United States to place insurance on each member of the crew of any vessel insuring against loss of life due to risk of war or war-like operations in the amount of $5,000 on all voyages, the same to be retroactive to Sunday, December 7th. We have been unable to determine whether this applies to barges and tugs operating on the Atlantic Coast to Norfolk, New York, and

Long Island Sound ports, or whether it is certainly intended to apply to vessels operating to war zones." (Def. Exhibit No. 1.)

Not receiving any answer, on January 19, the Southern Transportation Company addressed another letter to the Board asking for a prompt reply. (Def. Exhibit No. 2.)

The Southern Transportation Company then received a telegram from the Board, filed as Def. Exhibit No. 3, as follows:

"Relet January 9th decisions of Board respecting insurance and war risk compensation binding only upon signatories to Statement of Principles. Inasmuch as your organization was not represented at meeting at which Statement of Principles was adopted, it is not obligated to abide by decisions of Board. Am forwarding you copies of Statement of Principles and Board's decisions 1-5 inclusive."

Signed by EDWIN MACAULEY,
Chairman Maritime War Emergency Board.

By letter of January 31, 1942, Mr. Macauley, as Chairman, confirmed the substance of the above telegram. See Def. Exhibit No. 4.

There was also filed in evidence, as Def. Exhibit No. 5, a bulletin from the Atlantic Coast and Gulf of Mexico Towboat Association, being bulletin No. 507, which was received by the Southern Transportation Company in which there is quoted a similar telegram from Mr. Macauley, as Chairman, advising them that only signatories were bound by the decisions of the Board, and this was circularized.

So we have at the very begining of the whole proceeding the statement made by the Board, through its Chairman, of a recognition by it that only signatories were bound, and this was addressed not only to the

Southern Transportation Company, but to the Towboat Association so that this information might be sent out to its various members.

And the reason for not inviting these towboat employers is quite obvious. There had been no attack upon any tug or barges by the enemy submarines on the Coast, and as a matter of fact it was shown in the evidence of the companion cases that this was the first, and I think the only, occasion of such an attack. Towboats and barges were hardly worth the time and ammunition for sinking them. It was the larger craft engaged in carrying supplies in connection with the war effort that were the objects for destruction. This being so, there was no particular risk in this type of coastal or even intra-coastal trade.

In the second paragraph of the Statement of Principles the agreement by labor to withhold the exercise of its right to strike was "on a voluntary basis". Correspondingly the representation by the employers that there would be no lockouts was made.

By "Exhibit A" attached to the Statement of Principles it is suggested that the Board, consisting of three members, be named by the President, and that whenever any difference arises between operator and union which cannot be settled through the ordinary procedure of collective bargaining, such question should be referred to the Board by procedure therein referred to. Upon receiving such notice the Board shall give notice, hold a hearing and render its decision, and such decision is to be final and binding.

On December 22nd at 11:50 P. M. the Maritime War Emergency Board handed down its "Decision No. 1" in which it set forth the necessity for operators taking out war risk insurance upon members of its crews. It specifically stated from the very inception of this decision that it applied only to vessels documented under the laws of the United States "and covered by the Statement of Principles" (Appellant's Appendix, p. 62).

On February 6, 1942, the Board handed down its supplement to Decision No. 1 in which it suggested a form of policy to be used, and again in the second paragraph of that supplement it referred to those "covered by the Statement of Principles".

Later the Board handed down its Decision No. 2 and then a "Clarification of Decision No. 2". In that clarification it set forth various questions which had arisen as to the application and methods of procedure under the Board's rulings, and we quote the following from the ruling of the Board, as follows:

> "Q. No. 3—Who is bound by Decision No. 2 of the Maritime War Emergency Board? Answer: The decisions of the Board are binding only on the signatories to the Statement of Principles. The board considers that compliance with decisions by owners and operators or employees of the merchant marine not signatories to the Statement of Principles is not compulsory. The Board invites attention, however, to the following statement in Decision No. 2: 'All owners and operators of United States flag vessels of the American Merchant Marine and all licensed and unlicensed personnel employed on those vessels are expected to conform to this decision.'"

This ruling was signed by all three of the Board members, and is a definite, concrete and final decision of the Board as to who is bound by its decisions.

At the trial of these cases in the United States District Court plaintiffs first took the position that any ruling of the Board was binding upon us. However, when it was pointed out to the Court that in this clarification there was contained the above quoted ruling by the Board, plaintiffs then shifted their position and abandoned the idea that we were bound as a matter of law. However, the appellee here is protected in either event. First, as a matter of agreement it was not a

party, and was not invited to become a party. Second, if it is the ruling of the Board which governs then that ruling is in its favor, as above quoted.

Appellant attempts to avoid this ruling by saying that Decision No. 2 referred especially to the question of bonus. We point out, however, that the clarification answered numerous questions other than concerning bonus and definitely stated, not for any one purpose, but for all purposes who were bound.

At the trial below defendant produced Mr. J. G. Butler as a witness. He was a staff member of the Board and then acted as Secretary for the Board. He produced from his records the original orders and rulings of the Board which were introduced into evidence and copies made. At page 27 of the evidence he stated:

> "Q. Now, Mr. Butler, did the Maritime War Emergency Board attempt to exercise any jurisdiction over anyone who was not a signatory to the original Statement of Principles * * * ? A. No, it did not."

He also introduced in evidence a letter received by Mr. Macauley from Honorable S. Otis Bland, a member of the House of Representatives, dealing with a matter arising with reference to a claim in connection with the sinking of the Tug MENOMINEE, and also copy of letter, dated August 31, 1944, signed by Mr. Macauley, as Chairman, addressed to the Honorable S. Otis Bland, answering this letter. This answer was filed as Defendant's Exhibit 9, and from which we quote as follows:

> "This will acknowledge the receipt of your letter dated August 21, 1944, together with enclosures from Mr. Forrester Hancock addressed to Congressman Mansfield of Texas, concerning Mr. Johnnie Mitchell Bennett who lost his life at sea following the sinking of the Tug MENOMINEE due to enemy action.

"As the Southern Transportation Company, Inc., Norfolk, Virginia, the owners of the Tug MENOMINEE, on which the deceased served at the time of his death were not signatories to the Statement of Principles dated December 19, 1941, they were under no obligation to insure the complements of their vessels, unless they were under charter to the War Shipping Administration.

"Under the circumstances, and as the Tug MENOMINEE was not under the control of the War Shipping Administration at the time of the disaster, there seems to be nothing we can do to assist Mr. Hancock in this matter."

Here, again, is another evidence from the Chairman of the Board himself as late as 1944 that only signatories were bound.

Appellants contend that there should have been some formal hearing held with notice and arguments before any ruling could validly be made. We call attention to the fact that there was never any dispute between the parties as to this particular ruling, and there was no occasion at any time for a hearing. No point was ever made as to any attempt to hold those who were not signatories until sometime after the shelling and sinking of the Tug MENOMINEE when actions were brought for damages as well as these civil actions for war risk insurance. There was no occasion for any hearing, no seamen's union or anyone else ever questioned either the correctness or the legality of the ruling, and it had been accepted by all concerned.

Appellant has also referred to various statements made before a Congressional Committee inquiring into the general question of the welfare of the seamen. Undoubtedly what all of those participating in the hearing had in mind was the usual and ordinary vessel sailings into war zones where risk would be incurred. I do not find in any of the quotations any reference to a mere coastal tug and barge. As far as we have ascertained

all steamship operators employing vessels in the war zones were signatories to the Agreement, either directly or through their associations and, therefore, the information given at the hearing by representatives either of the Maritime Commission or of the Maritime War Emergency Board was directed to the immediate point. This allusion, therefore, to the Congressional hearings which were conducted quite sometime after the Agreement has no point especially when we read those quotations in the light of the surrounding circumstances.

Appellants take the position that this was a proclamation by the President of the United States, that it was all inclusive, that it bound the Southern Transportation Company as well as the signatories to the Agreement and that the President's appointment cannot be questioned.

In the first place this position ignores the fundamental basis for the appointment which was not an action by the President himself, but a form of agreement entered into by specific unions and operators making a request that a Board be appointed to handle various items that may come up by way of dispute and for the better regulation of ocean transportation during the period of the war. This matter of request and the matter of those who joined in the request was always recognized not only in the statement by the President, but in all of the rulings and decisions of the Board itself. No one ever went beyond the statement that it only applied to those "covered by the Statement of Principles".

Now as to the weight to be given to the Presidential statement. It is found at page 54 of appellant's appendix. That action of the President was not based upon any constitutional authority or by virtue of any Act of Congress. We should bear this strictly in mind in all considerations. By its own language the Board is appointed "*pursuant to the Agreement* reached December 19, 1941, between representatives of the Mari-

time Industry and the labor organizations *involved*". Here, in the very first clause of the President's statement we have the reason for his appointing the Board, and, second, that it pertains to the representatives of the Maritime Industry and the labor organizations *involved*". It was not a matter of Congressional action, nor was it a matter that came within the purview of any existing statute. It was merely that he, as President, was asked to name a Board to carry out the agreements reached by the *parties "involved"*. They could just as well have had the Secretary of Commerce or the Secretary of Labor, or any other heads of departments do the same thing. And the second part of this first paragraph again refers to the foundation for the statement, "In accordance with their joint request". It is not an action on the President's initiative, but merely responding to the request of certain parties to an agreement, he states: "I hereby designate." The last sentence of the statement gives a name to the Board and specifically states, "Its powers and purposes shall be those set forth in accordance with Exhibit A of the Agreement referred to above."

The District Judge, in speaking upon this phase of the case, said as follows, and we quote at some length because we think that the language of the conclusion as written by the Judge is particularly pertinent:

> "The plaintiffs refer to the setting up of the Board as the action of the Government under wartime powers and cite the case of *Gulf Oil Corporation* v. *Lastrap*, 48 Fed. Supp. 947, and *Jones* v. *Atlantic Refining Company*, 55 Fed. Supp. 17, in support of their contention. No other cases bearing upon the subject have been brought to my attention.
>
> "Upon an examination of the opinions cited, it is readily apparent that the question here involved was not before the Court in either of those cases. The question involved in the Gulf Oil case was whether a beneficiary without insurable interest in

the life of the deceased seaman was entitled to recover in preference to one with an insurable interest. In the Jones case the question in issue was whether the verdict of the jury was excessive in the allowance of damages under the Jones Act. Apparently in neither case was any question raised similar to the one now before the Court. It is not clear whether the defendants in those cases were signatories to the Statement of Principles nor whether the vessels were under charter to the War Shipping Administration. It is not necessary to discuss further the difference in the facts, but even a casual examination discloses that neither of those cases is any authority for the question here in issue.

"No applicable legislative act has been brought to my attention, nor have I been able to find one. I have examined the Merchant Marine Act of 1936 with special reference to the sub-division entitled 'Insurance (Title 46, Sections 1128, 1128(h), inclusive, U. S. C. A.), and I find nothing there to support the claims here asserted.

"In appointing the Board members the President made no reference to any authority conferred upon him either by Congres or by the Constitution. There is no suggestion that the conference was called pursuant to any congressional authority."

The action of the President not being founded upon any authority under his war-time powers or conferred upon him by either Congress or the Constitution was not, therefore, a legal action by the Government with the effect of being binding upon everyone, whether included in the original agreement, or not. In this connection, therefore, appellant is in this dilemma:—Either the Southern Transportation Company is not included as a signatory, in which event there was no obligation upon it by agreement to furnish war risk insurance, or, they are bound by the rulings of the Maritime War Emergency Board to the effect that this particular class of transportation is not included. In either event, the Southern Transportation Company is not liable.

CASES CITED BY PETITIONERS.

The only two cases cited by petitioners which were really pressed before the District Court and Circuit Court of Appeals are *Gulf Oil Corporation* v. *Lastrap*, 48 Fed. Supp. 947, and *Jones* v. *Atlantic Refining Company*, 55 Fed. Supp. 17. These cases, however, really do not touch the principle which is here involved. The District Judge in his opinion stated:

> "Upon an examination of the opinions cited it is readily apparent that the question here involved was not before the Court in either of those cases."

Judge Soper in the Appellate opinion, referring to these two decisions, states:

> "Plaintiffs also rely on the decisions in *Gulf Oil Corp* v. *Lastrap*, D. C. S. D. Tex., 48 F. Supp. 947, and *Jones* v. *Atlantic Refining Co.*, D. C. E. D. Pa., 55 F. Supp. 17, but in these cases applicability of the decisions of the Maritime War Emergency Board was conceded, so that the point involved in the case at bar was not raised."

We think that the opinions of these two courts sufficiently answers these main authorities of petitioners. However, petitioners cite six other cases, not bearing upon this point, but bearing upon the binding effect of any order entered by a duly authorized agency of the Government. Here it is pertinent to point out that in each of the cases cited by petitioners there was a direct authority from Congress for the appointment of the agency, with the powers of such agency duly prescribed, whereas in the present case there was no such appointment. These cases have no bearing upon the question under discussion here.

REASONS FOR NOT GRANTING A WRIT.

Respondent alleges the following as compelling reasons for not granting a writ in this case:

(1) The decisions both of the District Court and the United States Court of Appeals for the Fourth Circuit are plainly right and should not be disturbed.

(2) If the decisions of the Maritime War Emergency Board are binding then, as found by Judge Soper in the Appellate Court decision, the clarification by the Board itself is binding upon petitioners, and is adverse to them.

(3) There is no new or novel point of law involved, or any matter of general interest.

(4) There is no conflict of decision.

(5) At most it would only be a moot question applicable to an isolated case. This claim arose under the terms of an agreement which has long been fulfilled by the signatories thereto; the War Emergency Board created thereunder has long since been dissolved; as far as we can ascertain there has never been any other claim of a similar nature, nor could there now be, so that no general interest can possibly exist.

CONCLUSION.

The decisions below are clearly correct and for the reasons assigned we submit that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

LEON T. SEAWELL,
Attorney for Respondent.